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A

Tan Jye Yee & Anor v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL W-09–327–12 OF 2013
MOHTARUDIN BAKI, ROHANA YUSUF AND TENGKU MAIMUN JJCA
6 AUGUST 2014

C

Criminal Law — Sedition — Publication of offensive pictures and message — Appellants posted offensive picture and message on Facebook account — Application to strike out charge dismissed by High Court — Appeal to Court of Appeal — Whether s 298A of the Penal Code is in pith and substance, a legislation on religion of Islam — Whether legislation concerning public order — Sedition Act 1948 s 4(1)

D

E The appellants were charged in the sessions court under s 4(1) of the Sedition Act 1948 ('the Act') and s 298A(1)(a) of the Penal Code for the offence of posting on their Facebook a Hari Raya greetings, the contents among which were the photographs of the appellants enjoying Bak Kut Teh with the 'Halal' logo. In addition to that, the appellants were also charged under s 5(1) of the Film Censorship Act 2001 for certain obscene publications in the Tumblr website. The appellants then applied to the High Court to strike out the charge under s 298A of the Penal Code for creating enmity between persons of different religions as a result of the said posting. Essentially, the application was premised on the fact that the Supreme Court had already decided on the legality of s 298A of the Penal Code. Relying on *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b ('Mohamed Nor') and the minority judgment in *Mamat bin Daud & Ors v The Government of Malaysia* [1988] 1 MLJ 119 ('Mamat bin Daud'), the High Court dismissed the application. Aggrieved by the said decision, the appellants appealed to the Court of Appeal. The issues that arose were whether s 298A is, in pith and substance, a legislation on the religion of Islam or whether it is a legislation concerning public order. Reliance was again placed by the respective parties on the Supreme Court decisions in the abovementioned cases.

F

G

H

I **Held**, allowing the appeal:

(1) Given that the Supreme Court had decided on s 298A, it was not open for the Court of Appeal to investigate the true character or substance of s 298A. There was no necessity to consider whether the pith and

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substance of s 298A is a subject matter of religion or public order. What the Court of Appeal had to consider was the application of the doctrine of stare decisis (see para 19–20).

(2) The decision of the Supreme Court in *Mamat bin Daud* was on a principle of law. The facts would not have mattered. In considering the issue whether Parliament or the State Legislative Assemblies should legislate the impugned section, the Supreme Court had, by majority ruled that s 298A is, in pith and substance, a law on religion while the dissenting judgment ruled that it is on public order and criminal law. It is the majority judgment of the Supreme Court that creates the binding precedent. The dissenting judgment could not be accepted as the correct state of law over the majority judgment (see para 24).

(3) Since the issue before the Supreme Court was purely on the adequacy of sentence, there was no proposition as such by the Supreme Court in *Mohamed Nor*, on the true character and substance of s 298A. Section 298A was designed to preserve law and order, was not the pronouncement of the Supreme Court as perceived by the judge but was the finding of the High Court. In the circumstances, it could not be said that the ratio decidendi of the two decisions of the Supreme Court was in conflict with one another (see para 29).

(4) The High Court judge had erred in refusing to follow the majority decision of the Supreme Court on the true character and substance of s 298A. The order of the High Court was set aside (see para 30).

[Bahasa Malaysia summary

Perayu-perayu telah dituduh di mahkamah sesyen di bawah s 4(1) Akta Hasutan 1948 ('Akta tersebut') dan s 298A(1)(a) Kanun Keseksaan kerana kesalahan meletakkan posting di Facebook mereka ucapan Hari Raya, yang mana kandungannya, antara lain, adalah gambar perayu-perayu menikmati makanan Bak Kut Teh dengan logo 'Halal'. Selain itu, perayu-perayu juga dituduh di bawah s 5(1) Akta Penapisan Filem 2001 untuk penerbitan lucah tertentu di laman web Tumblr. Perayu-perayu kemudian telah memohon kepada Mahkamah Tinggi untuk membatalkan pertuduhan di bawah s 298A Kanun Keseksaan kerana menimbulkan permusuhan antara orang-orang yang berbeza agama akibat posting tersebut. Pada dasarnya, permohonan itu berasaskan fakta bahawa Mahkamah Agung telah pun memutuskan berhubung kesahan s 298A Kanun Keseksaan. Berdasarkan *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b ('Mohamed Nor') dan penghakiman minoriti dalam kes *Mamat bin Daud & Ors v The Government of Malaysia* [1988] 1 MLJ 119 ('Mamat bin Daud'), Mahkamah Tinggi menolak permohonan itu. Terkilan dengan keputusan tersebut, perayu-perayu merayu kepada Mahkamah Rayuan. Isu-isu yang timbul adalah sama ada s 298A adalah, suatu perundangan tentang agama Islam atau sama ada ia adalah

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perundangan berkenaan ketenteraman awam. Kebergantungan sekali lagi diletakkan oleh pihak-pihak berkenaan kepada keputusan-keputusan Mahkamah Agung dalam kes-kes yang tersebut di atas.

Diputuskan, membenarkan rayuan:

(1) Oleh kerana Mahkamah Agung telah membuat keputusan tentang s 298A, ia tidak terbuka untuk Mahkamah Rayuan menyiasat sifat atau kandungan sebenar s 298A. Tiada keperluan untuk mempertimbangkan sama ada kandungan sebenar s 298A adalah hal perkara berhubung agama atau ketenteraman awam. Apa yang perlu dipertimbangkan oleh Mahkamah Rayuan adalah permohonan doktrin stare decisis (lihat perenggan 19–20).

(2) Keputusan Mahkamah Agung dalam kes *Mamat bin Daud* adalah berdasarkan prinsip undang-undang. Fakta itu tidak penting. Dalam mempertimbangkan isu sama ada Parlimen atau Dewan Undangan Negeri patut menggubal seksyen yang dipersoalkan, Mahkamah Agung telah, dengan majoriti memutuskan bahawa s 298A adalah, dari segi isi dan kandungan, suatu undang-undang berhubung agama manakala penghakiman yang menentang memutuskan bahawa ia adalah berhubung ketenteraman awam dan undang-undang jenayah. Ia adalah penghakiman majoriti Mahkamah Agung menjadi duluan yang mengikat. Penghakiman yang menentang tidak boleh diterima sebagai undang-undang yang betul mengatasi penghakiman majoriti (lihat perenggan 24).

(3) Oleh kerana isu di hadapan Mahkamah Agung semata-mata berhubung kesesuaian hukuman, tiada saranan sedemikian oleh Mahkamah Agung dalam kes *Mohamed Nor*, berhubung sifat dan kandungan s 298A. Seksyen 298A digubal untuk memelihara undang-undang dan ketenteraman, bukan keputusan Mahkamah Agung sebagaimana dilihat oleh hakim tetapi penemuan Mahkamah Tinggi. Dalam keadaan berikut, tidak boleh dikatakan bahawa ratio decidendi kedua-dua keputusan Mahkamah Agung adalah bercanggah dengan satu sama lain (lihat perenggan 29).

(4) Hakim Mahkamah Tinggi terkhilaf kerana enggan mengikut keputusan majoriti Mahkamah Agung berhubung sifat dan kandungan s 298A. Perintah Mahkamah Tinggi telah diketepikan (lihat perenggan 30).]

Cases referred to

Barat Estates Sdn Bhd v Parawakan a/l Subramaniam & Ors [2000] 4 MLJ 107, CA (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 CLJ 577, FC (refd)

Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (previously known as

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syarikat Teratai KG Sdn Bhd) [2006] 1 MLJ 435, CA (refd)
Mamat bin Daud & Ors v The Government of Malaysia [1988] 1 MLJ 119; [1988] 1 CLJ (Rep) 197, SC (refd)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)

Legislation referred to

Criminal Procedure Code s 294
Federal Constitution arts 4, 10(1)(a), 11(4), (5), Ninth Schedule, List I, Federal List, Items 3, 4, para 4(k), List II, State List, Item 1
Film Censorship Act 2002 s 5(1)
Penal Code s 298A, 298A(1)(a)
Sedition Act 1948 s 4(1)(c)

Appeal from: Criminal Application No 44–94–08 of 2013 (High Court, Kuala Lumpur)

Chong Joo Tian (Wong Kee Them and Nur Adilah bt Kamarzaman with him) (JT Chong Assoc) for the appellants.
Wan Shaharuddin bin Wan Ladin (Haffiza bt Jemali with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellants had posted on their Facebook a Hari Raya greetings, the contents among which are the photographs of the appellants enjoying Bak Kut Teh with the 'Halal' logo and the following comments:

> Selamat Berbuka Puasa (dengan Bak Kut Teh ... wangi, enak menyelerakan!!! ... Izinkan kami memperkenalkan cara kami memupuk semangat 1 Malaysia dengan bertukar-tukar makanan antara kaum-kaum Malaysia pada musim perayaan yang mulia ini. Hak untuk menikmati juadah enak tempatan seharusnya merentasi batasan bangsa dan juga agama. Kepada saudara-saudari yang beragama Islam, selamat berbuka puasa dan Salam Aidilfitri.

[2] The appellants were charged in the Sessions Court Kuala Lumpur for the following offences:

(a) under s 4(1)(c) of the Sedition Act 1948 in relation to the appellants' posting of a Hari Raya greeting on their Facebook intituled 'Selamat Berbuka Puasa (dengan Bak Kut Teh ... wangi, enak, menyelerakan)';

(b) under s 298A(1)(a) of the Penal Code for the same posting; and

(c) under s 5(1) of the Film Censorship Act 2002 for certain obscene publication in their Tumblr website.

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[3] The appellants pleaded not guilty and claimed trial to all the three charges.

[4] The appellants then sought to strike out the charge under s 298A of the Penal Code for creating enmity between persons of different religions as a result of the said posting. They filed an application in the High Court seeking, inter alia, the following declaration:

(a) that s 298A is unconstitutional as it contravenes the appellants' right to freedom of expression under art 10(1)(a) of the Federal Constitution; and/or

(b) that s 298A is a legislation made by Parliament under art 10(1)(a) of the Federal Constitution and para 4(k), (Federal List) of the Ninth Schedule of the Federal Constitution relating to the religion of Islam for the federal territory and is therefore not applicable to the appellants who are non-Muslims.

[5] Essentially, the application was premised on the fact that the Supreme Court had already decided on the legality of s 298A of the Penal Code.

[6] For convenience, s 298A is reproduced below:

> (1) Whoever by words, either spoken or written, or by signs, or by visible representations, or by any act, activity or conduct, or by organizing, promoting or arranging, or assisting in organizing, promoting or arranging, any activity, or otherwise in any other manner —
>
> (a) causes, or attempts to cause, or is likely to cause disharmony, disunity, or feelings of enmity, hatred or ill will; or
>
> (b) ...
>
> on grounds of religion, between persons or group of persons professing the same or different religions, shall be punished with imprisonment for a term of not less two years and not more than five years.
>
> (2) Sections 173A and 294 of the Criminal Procedure Code shall not apply in respect of an offence under subsection (1).
>
> (3) Where any person alleges or imputes in any manner specified in subsection (1) —
>
> (a) that any person, or any class, group or description of persons, professing any particular religion —
>
> (i) had ceased to profess that religion;
>
> (ii) should not be accepted, or cannot be accepted, as professing that religion; or
>
> (iii) does not believe, follow, profess, or belong to, that religion; or

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(b) that anything lawfully done by any religious official appointed, or by any religious authority established, constituted or appointed, by or under any written law, in the exercise of any power, or in the discharge of any duty, or in the performance of any function, of a religious character, by virtue of being so appointed, established or constituted, is not acceptable to such person, or should not be accepted by any other person or persons, or does not accord him or fulfil the requirements of that religion, or is otherwise wrong or improper;

he shall be presumed to have contravened the provisions of subsection (1) by having acted in a manner likely to cause the disharmony, disunity or feelings of enmity, hatred or ill will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing the religion referred to in the allegation or imputation.

(4)(a) Where, on the ground of a religious character, any person professing any particular religion uses for burial or cremation of any human corpse a place other than one which is lawfully used for such purpose by persons professing that religion, he shall be presumed to have contravened the provisions of subsection (1) by having acted in a manner likely to cause disharmony, disunity or feelings of enmity, hatred or ill will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing that religion.

(b) Where any person, on any ground of a religious character, counsels, advises, instigates, urges, pleads with or appeals or propagates to, or in any manner or by any means calls upon, whether directly or indirectly, any other person or persons professing any particular religion:

(i) to use for burial or cremation of any human corpse a place other than one which is lawfully used for such purpose by persons professing that religion —

(ii) not to use for burial or cremation of any human corpse any place which is lawfully used for such purpose by persons professing that religion; or

(iii) not to use for worship any place which is lawfully used for such purpose by persons professing that religion,

he shall be presumed to have contravened the provisions of subsection (1) by having acted in a manner likely to cause disharmony, disunity or feelings of enmity, hatred or ill will, or likely to prejudice the maintenance of harmony or unity, between persons or groups of persons professing that religion or different religions.

(5) Where any person who is not a religious official appointed, or a religious authority established, constituted or appointed, by or under any written law purports to exercise any power, or to discharge any duty, or to perform any function, of a religious character, being a power, duty or function which can be lawfully exercised, discharged or performed only by a religious official appointed, or a religious authority established,

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constituted or appointed, by or under any written law, he shall be presumed to have contravened the provisions of subsection (1) by having acted in a manner prejudicial the maintenance of harmony or unity, between persons or groups of persons professing the same or different religions.

(6) The foregoing provisions of this section shall not apply to —

(a) anything done by any religious authority established, constituted or appointed by or under any written law and conferred by written law with power to give or issue any ruling or decision in any manner pertaining to the religion in respect of which the authority is established, constituted or appointed; or

(b) anything done by any person which is in pursuance of, or which accords with, any ruling or decision given or issued by such religious authority, whether or not such ruling or decision is in writing, and if in writing, whether or not it is published in the *Gazette*.

(7) It shall not be a defence to any charge under this section to assert that what the offender is charged with doing was done in an honest belief in, or in any honest interpretation of, any precept, tenet or teaching of any religion.

(8) If in any proceedings under this section any question arises with regard to the interpretation of any aspect of, or any matter in relation to any religion, the Court shall accept the interpretation given by any religious authority referred to in subsection (6), being a religious authority in respect of that religion.

PROCEEDINGS IN THE HIGH COURT

[7] Central to the arguments of learned counsel for the appellants and learned deputy public prosecutor was the two decisions of the Supreme Court in the case of *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b and *Mamat bin Daud & Ors v The Government of Malaysia* [1988] 1 MLJ 119; [1988] 1 CLJ (Rep) 197.

[8] Relying on *Mohamed Nor*, and the minority judgment in *Mamat bin Daud*, the High Court dismissed the application.

[9] Aggrieved by the said decision, the appellants appealed to the Court of Appeal. We had unanimously allowed the appeal and we now give our reasons.

THE APPEAL

[10] As in the High Court, the crux of the submissions before us was on the issue whether s 298A is in pith and substance a legislation on the religion of Islam or whether it is a legislation concerning public order. Reliance was again placed by the respective parties on the Supreme Court decisions in the abovementioned cases.

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[11] Given the reliance on the two decisions, we think it is appropriate to state the gist of those cases. A

[12] In *Public Prosecutor v Mohamed Nor*, the first and fourth respondents were charged for acting in a manner likely to prejudice the maintenance of unity on grounds of religion between persons professing the religion of Islam by acting as *Bilal* during the performance of Friday prayers, an offence under s 298A of the Penal Code. The second respondent was charged under the same section but as *Imam* and the third respondent, as *Khatib*. The learned trial judge bound them over a period of three years to keep the peace and be of good behaviour under s 294 of the Criminal Procedure Code . The public prosecutor appealed on the ground that the learned judge had failed to impose a deterrent sentence. The appeal was dismissed by the Supreme Court. B C

[13] In *Mamat bin Daud*, the petitioners, pursuant to leave obtained under art 4 of the Federal Constitution, filed their suit for declaratory orders to the effect that s 298A of the Penal Code is invalid on the ground that it makes provision with respect to a matter which Parliament has no power to make law. The petitioners contended that having regard to the pith and substance of the section, it is a law which ought to be passed not by Parliament but by State Legislative Assemblies, it being a legislation on Islamic religion according to art 11 cl (4) and Item 1 of List II, Ninth Schedule. For the respondent, it was contended that the section is valid as it is a law passed by Parliament on the basis of public order, internal security and also criminal law according to art 11 cl (5) and Items (3)–(4) of List 1, Ninth Schedule. The Supreme Court allowed the petitioners' application by majority. D E F

[14] Mohd Azmi SCJ, in the majority judgment said:

> In determining whether s 298A in pith and substance falls within the class of subject matter of 'religion' or 'public order', it is the substance and not the form or outward appearance of the impugned legislation which must be considered. The impugned statute may even declare itself as dealing with religion, but if on investigation of the legislation as a whole, it is in fact not so, the court must so declare. Conversely, it is not sufficient for the impugned legislation to declare itself as dealing with public order, if in substance, it seeks to deal directly or indirectly with religion or religious law, doctrine or precept, for no amount of cosmetics used in the legislative make up can save it from being struck down for pretending to be what it is not. The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs. ... G H I
>
> On the scope and meaning of the doctrine of colourable legislation BK Mukherjee J had this to say in *KCG Narayan Deo v State of Orissa* AIR 1953 SC 375:
>
> > ... The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law ...

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> If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within the respective spheres marked out by specific legislative entries, ... questions do arise as to whether the legislature in a particular case has or has not ... transgressed the limits of its constitutional powers. Such transgressions may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. ...
>
> Applying the above principles, we shall now proceed to examine the provisions of s 298A with strictness (as was done by the Privy Council in *Attorney General for Ontaria v Reciprocal Insurers* [1924] AC 328), the real substance of the legislation for the purpose of determining whether it is a colourable legislation, as alleged by the petitioners.

[15] Having alluded to the specific sub-sections of s 298A, the learned SCJ then said:

> ln our view, all these specified acts and conducts have nothing to do with 'public order' as envisaged by the Federal List; but they are directly concerned with religious matters or religious affairs. ...
>
> From our investigation, the claim that religion is merely incidental to the legislation cannot hold water. We therefore find neither Item 3(a) not Item 4(b) of the Federal List forms the substance of the subject matter of the impugned section. Nor can the impugned section take refuge under art 11 cl (5) of the Constitution, as it simply cannot pass the subjective test of being a legislation relating to public order, public health or morality. Having considered and examined the provisions of s 298A as a whole, we rule that it is a colourable legislation in that it pretends to be a legislation on 'public order', when in pith and substance it is a law on the subject of religion with respect to which only the states have power to legislate under arts 74 and 77 of the Constitution. ...
>
> For reasons discussed, we allow the first two orders sought in the suit, viz (1) a declaration that s 298A of the Penal Code is a law with respect to a matter with respect to which Parliament has no power to make law, and (2) a declaration that s 298A of the Penal Code is invalid and therefore null and void and of no effect. ...

[16] Salleh Abas LP who also wrote the majority judgment said:

> Viewed in its proper perspective, the impugned section ... is a law, the object of which is to ensure that Islamic religion practised in this country must conform to the tenets, precepts and practices allowed by states. ... In enacting this impugned section I do not think that Parliament can really rely on its powers to legislate on public order because the exercise of such power comes in a direct conflict with state powers to legislate on, and control, the practices of Islamic religion.

[17] To sustain the charge under s 298A(1)(a) and to support his submission that the application of s 298A is not exclusive to the Muslims as the object of the said section was to ensure public order, the learned deputy made reference

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to the *Hansard*. Indirectly, the learned deputy was inviting us to revisit the issue on the true character and substance of s 298A.

[18] The learned deputy submitted thus:

> Mengguna pakai ratio di dalam penghakiman Mohd Azmi SCJ ini adalah jelas Mahkamah sekarang ini perlu membuat penyiasatan di dalam bentuk penilaian bukan sahaja secara am terhadap Seksyen 298A Kanun Keseksaan tetapi khususnya apakah *subject matter* pertuduhan yang dikenakan kepada Perayu-perayu dan apakah objektif, tujuan dan mengapa pertuduhan dirangka ke atas Perayu-perayu.
>
> Jika kandungan pertuduhan ke atas Perayu-perayu dibaca dengan teliti ia adalah bukan secara langsung berkenaan pentadbiran ajaran agama Islam tetapi penghinaan terhadap ajaran serta fahaman agama Islam oleh orang bukan Islam. Memandangkan kedua-dua perayu adalah bukan penganut agama Islam sudah tentu mereka tidak akan dapat diambil tindakan di bawah mana-mana Enakmen Syariah. Perayu-perayu tidak boleh dilepaskan summarily pada peringkat ini tanpa kami dapat memanggil sebarang saksi kerana Seksyen 298A Kanun Keseksaan secara amnya dan pertuduhan tersebut secara khususnya *in substance* adalah berkenaan *public order* dan *public tranquillity*.

[19] With respect, given that the Supreme Court had decided on s 298A, it was not open for us to investigate the true character or substance of s 298A. We thus found no necessity to consider whether the pith and substance of s 298A is a subject matter of religion or public order.

[20] What we had to consider was the application of the doctrine of stare decisis. The submission of learned counsel for the appellants was that the learned trial judge was bound by the majority decision in *Mamat Daud*. The learned deputy, on the other hand, submitted that the decision of *Mamat Daud* was not applicable; that the doctrine of stare decisis should not be followed blindly and that the decision in *Mamat Daud* should not be given a blanket application.

[21] The importance of the doctrine of stare decisis had been enunciated in a number of cases. We will only refer to one of them. In *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577, Steve Shim CJ (Sabah and Sarawak) said:

> [3] Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnapan & Anor v Public Prosecutor* [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said:
>
> > We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in

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A disobedience to the well-entrenched doctrine of stare decisis. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

B

[22] The learned judge had given his interpretation on s 298A contrary to that of the majority decision of the Supreme Court in *Mamat Daud* when His Lordship said:

C [19] Mahkamah ini juga bersetuju dengan hujahan balas Tuan TPR yang bijaksana yang menyangkal hujahan peguambela pemohon-pemohon bahawa s 298A Kanun Keseksaan hanya berkaitan dengan agama Islam semata-mata. Mahkamah ini bersetuju dengan hujahan Tuan TPR bahawa tujuan s 298A Kanun Keseksaan digubal oleh Parlimen adalah untuk tujuan bagi menjaga ketenteraman awam di kalangan rakyat Malaysia yang berbilang kaum, bangsa dan juga berbilang agama. D Turut dihujahkan bahawa s 298A Kanun Keseksaan tersebut tidak menyatakan bahawa peruntukan itu secara khususnya terpakai kepada orang-orang yang beragama Islam semata-mata. Mahkamah ini memilih untuk mengikuti pandangan dan keputusan yang telah diberikan oleh Mahkamah Agung dalam kes *Mohamed Nor* dan juga pandangan 'dissenting' dalam kes *Mamat Daud*.

E ...

[21] ... membaca peruntukan di bawah s 298A(1)(a) Kanun Keseksaan di atas, amat jelas sejelas gelas kristal bahawa peruntukan tersebut langsung tidak menyebut secara khusus bahawa peruntukan tersebut ditujukan khas kepada penganut (sic) beragama Islam. Perkataan-perkataan yang digunakan '... professing the same or F different religions, ...' menunjukkan bahawa peruntukan tersebut terpakai bukan sahaja kepada penganut agama Islam malahan terpakai kepada penganut agama-agama atau kepercayaan yang lain juga.

G **[23]** In departing from the majority decision of the Supreme Court in *Mamat Daud*, His Lordship had sought to distinguish the present case in the following words:

22. Mahkamah ini berpandangan bahawa fakta, keadaan dan situasi dalam kes *Mamat Daud* adalah berbeza dengan fakta, keadaan dan situasi yang timbul dalam kes terhadap pemohon-pemohon. Pertuduhan dalam kes *Mamat Daud* melibatkan H isu berkaitan dengan pegawai masjid yang tidak mempunyai tauliah dan melibatkan orang beragama Islam di Terengganu. Pertelingkahan berlaku apabila sembahyang Jumaat diadakan di dua masjid berbeza dalam satu kariah disebabkan oleh perbezaan fahaman politik. Sedangkan dalam kes terhadap pemohon-pemohon, selain berlaku di Kuala Lumpur, ianya melibatkan orang I bukan Islam yang didakwa telah menghina orang-orang yang beragama Islam di dalam bulan Ramadan yang mulia dan lagi berkat bagi orang-orang Islam.

[23] Dalam kes *Mamat Daud* juga melibatkan perpecahan di kalangan orang-orang Islam di Terengganu dan tidak melibatkan kaum atau penganut agama atau kepercayaan yang lain. Sedangkan kes terhadap pemohon-pemohon melibatkan isu

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yang lebih meluas dan lebih sensitif yang jika tidak dibendung boleh menimbulkan pertelingkahan antara kaum, agama dan bangsa yang terdapat di Malaysia. Tujuan utama s 298A(1)(a) Kanun Keseksaan adalah untuk mencegah dari berlakunya perkara-perkara tersebut sehingga boleh menggugat ketenteraman awam serta keselamatan negara secara keseluruhannya. Peruntukan tersebut turut memperuntukkan hukuman terhadap pelaku-pelaku yang melakukan kesalahan yang dipandang amat serius tersebut di mana sabit kesalahan boleh membawa hukuman penjara maksima lima tahun.

[24] Mahkamah ini berpandangan bahawa keputusan majoriti Mahkamah Persekutuan (sic) dalam kes *Mamat Daud* tidak mengikat mahkamah ini atas alasan yang dinyatakan di atas. Dalam keadaan sedemikian, mahkamah ini lebih memihak kepada dapatan dan keputusan yang dibuat oleh Mahkamah Agung dalam kes *Mohamed Nor* dan pandangan yang diberikan oleh minoriti dalam kes *Mamat Daud*.

[24] The decision of the Supreme Court in *Mamat Daud* was on a principle of law. The facts would not have mattered. In considering the issue whether Parliament or the State Legislative Assemblies should legislate the impugned section, the Supreme Court had, by majority ruled that s 298A is, in pith and substance, a law on religion while the dissenting judgment ruled that it is on public order and criminal law. It is the majority judgment of the Supreme Court that creates the binding precedent. The dissenting judgment cannot be accepted as the correct state of law over the majority judgment (see *Barat Estates Sdn Bhd v Parawakan a/l Subramaniam & Ors* [2000] 4 MLJ 107; *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (previously known as syarikat Teratai KG Sdn Bhd)* [2006] 1 MLJ 435).

[25] The true character and substance of s 298A had thus been determined by the Supreme Court, which ruling had nullified the submission of the learned deputy and the finding by the learned judge that s 298A is, in pith and substance, a law on public order. We (as the learned judge) were in no position to examine the section to make a new ruling or to decide otherwise.

[26] The learned judge had also stated that '... mahkamah ini lebih memihak kepada dapatan dan keputusan yang dibuat oleh Mahkamah Agung dalam kes *Mohamed Nor* ...'. In this regard, the learned deputy submitted that the ratio decidendi of the two decisions of the Supreme Court was in conflict and hence the High Court may choose which ratio decidendi it will follow.

[27] It must be noted that in *Mohamed Nor*, there was no challenge on s 298A. Unlike in *Mamat Daud* where the Supreme Court was called upon to determine the true character and substance of s 298A, in *Mohamed Nor*, the only issue before the Supreme Court was whether the sentence passed by the High Court was appropriate.

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[28] In dismissing the appeal by the prosecution against sentence, Abdul Hamid CJ (Malaya) in *Mohamed Nor* said:

> In the instant case the learned judge recognised that this section is designed to preserve law and order to maintain a state of harmony, unity and goodwill between persons or groups of persons professing the same or different religions that are being practiced in this country by preventing such persons from causing or attempting to cause disharmony or disunity or feelings of enmity, hatred or ill-will, and that the offences of the nature committed by the four respondents will have the effect of jeopardising Islamic unity, in the result, prejudicing the maintenance of unity and harmony in the country. The learned judge proceeded to bind them over, to keep peace and good behaviour under s 294 of the Criminal Procedure Code.
>
> ...
>
> The question now remains whether we should disturb the sentence in the instant case.

[29] Since the issue before the Supreme Court was purely on the adequacy of sentence, there was no proposition as such by the Supreme Court in *Mohamed Nor*, on the true character and substance of s 298A. What was set out in the judgment quoted above, that s 298A was designed to preserve law and order, was not the pronouncement of the Supreme Court as perceived by the learned judge but was the finding of the High Court. In the circumstances, it cannot be said that the ratio decidendi of the two decisions of the Supreme Court was in conflict with one another.

[30] Having regard to all the above, we found that the learned judge had erred in refusing to follow the majority decision of the Supreme Court on the true character and substance of s 298A. We set aside the order of the High Court and we granted the orders prayed for by the appellants.

Appeal allowed.

Reported by Afiq Mohamad Noor